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In The

Supreme Court of the United States

October Term, 1995

SSC CORP.,

Petitioner,

vs.

TOWN OF SMITHTOWN, TOWN BOARD OF THE TOWN OF SMITHTOWN and PATRICK VECCHIO, Supervisor, Town of Smithtown,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below was correct in finding that the Respondents were acting as a market participant in hiring Petitioner to perform waste collection and disposal services in its Improvement, and thereby entitled to specify the terms of its contract with Petitioner.

2. Whether the court below properly refused to review the Petitioner's contract with the Respondents under the dormant aspect of the Commerce Clause, because the creation of the special Improvement district at issue was not challenged below, and therefore, no regulatory act performed by the Respondents in connection with the Improvement was before the Court.

3. Whether a "natural resource" exception to the Market Participant Doctrine exists, and if so, whether solid waste is such a natural resource.

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STATEMENT OF THE CASE

A. Preliminary Statement

In the decision below, the Second Circuit Court of Appeals employed a straightforward application of established constitutional principles to uphold the terms of a publicly bid contract (the "Contract") between Petitioner SSC Corp. ("SSC") and Respondent Town of Smithtown (the "Town"). The Court's decision with regard to the Town's powers to hire contractors to assist it in the provision of municipal services made no new law, and did not constitute an "evasion" of the ruling in *C&A Carbone v. Town of Clarkstown*, __ U.S. __, 114 S. Ct. 1677 (1994), as claimed here by SSC. *Carbone* was not implicated in the Contract dispute between the parties simply because SSC failed to challenge — and indeed stipulated to the propriety of — the initial regulatory act which would have been subject to Commerce Clause analysis: the act creating the Town's Solid Waste Collection and Disposal Improvement.

Two independent municipal actions were undertaken by the Town in 1991-92 to manage its solid waste. It passed a local law (the Code) under its police powers, mandating that all waste generated in the Town, including waste collected under private arrangement from commercial sources and institutions, be delivered to Town designated facilities. Then it separately created, through its taxing power, a special district comprised of identified residential properties (the Solid Waste Collection and Disposal Improvement) to which it assessed charges and provided comprehensive collection and disposal service.

SSC, a waste hauler with commercial customers and alleged relationships with out-of-state landfills, challenged

the Code as an unconstitutional regulation of interstate commerce, citing the court's holding in *C&A Carbone v. Town of Clarkstown*. It was successful in this regard. The Code was struck down by the Court below.

SSC, as the beneficiary of the Town's award of a Contract in the Improvement district, did not challenge the Town's exercise of its taxing power to collect fees and provide waste service to its residents. To the contrary, it stipulated that the exercise of that power, particularly the elimination of other, independent private services, was a valid exercise of municipal power. Instead, SSC was forced to employ the fallacious argument that flaws in the Town's Solid Waste Code somehow undermined the entirely independent creation of the Improvement, giving it the right to disregard the terms of its Contract.

The Court of Appeals easily saw through the smoke and distinguished the two municipal actions. It came to the obvious conclusion that the Town was merely fulfilling its service obligations, and thereby acting as a market participant, when it hired and issued directions to its contractors. The regulatory act occurred earlier, when the Town formed the Improvement, taxed its citizens and undertook to provide the service. SSC did not, and could not, challenge that seminal act without giving up its own privileged position as exclusive contractor in its bid areas.

SSC attempts the same deception here, but in so doing, misstates the holding of the Court below.

B. Misstatements of Fact and Law

In the Statement of Jurisdiction of the Petition (p. 1), SSC claims that "the Court of Appeals upheld, in a final judgment,

a local town ordinance and certain provisions of a Contract issued under that ordinance against a challenge under the dormant Commerce Clause of the Constitution Art. I, Sect. 8, cl. 3," (emphasis added). In fact, the Court of Appeals did not uphold any portion of the ordinance as challenged by SSC, and did not hold that the Improvement Contract was issued pursuant to the ordinance. The two municipal actions were entirely independent and were treated as such throughout the opinion of the Court.

In *Questions Presented #1* (p. i) and throughout the Petition, SSC implies that it has an existing, independent business relationship with individual residents of the Improvement for collection service, and that the Improvement Contract is a device designed to interfere with that relationship by imposing conditions on the conduct of its business. In fact, SSC has no such relationship with residents, but performs services and receives compensation solely for and from the Town. The implication otherwise is a misstatement of the facts.

So, too, is the statement in the Petition at 7-8 that the parties have stipulated that landfills available to SSC charge tipping fees lower than the $65 per ton fee "imposed by the privately owned local incinerator favored by the Town in the Contract." The stipulation by the parties did not state that fees were at any time imposed on SSC by the incinerator operator, and in fact, this is not the case. (See Cross-Petition Appendix B, ¶ 8 at 55a). As the Court of Appeals correctly noted in its decision (Appendix to Petition at 10a-11a), the $65 per ton tipping fee was charged solely by Smithtown as a term of the Contract. SSC paid no disposal fees to any entity but the Town. SSC was not forced to, and in fact did not, enter into any business transaction with Smithtown's incinerator operator. Its mischaracterization of the stipulation is an

attempt to draw a false comparison between Smithtown's Contract and the local ordinance struck down in *Carbone*.

STATEMENT OF FACTS

Smithtown is a political subdivision of the State of New York, located in western Suffolk County on Long Island, with a population of approximately 125,000 persons. It is a suburban community comprised of roughly 32,000 residential households, and is home to a variety of businesses, institutions and industrial enterprises. Roughly 60% of the Town's solid waste is generated by its residences, 40% by commercial and institutional generators.

In 1991, pursuant to Article 3A § 54 of the Town Law of the State of New York (McKinney 1987), the Town established an Improvement for the purpose of providing collection and disposal service to Smithtown's 32,000 residences. Through the Improvement, residential property owners are assessed an annual fee in their property tax bill for garbage service. The assessment, in turn, is based upon the cost of services procured by the Town through publicly bid contracts under N.Y. General Municipal Law § 103 (McKinney 1986).

The Petitioner SSC is a carting firm licensed to collect solid waste in the Town of Smithtown. The Town prepared and solicited bids for service in the Improvement in November 1991. SSC was low bidder on and was awarded 7 of the 10 contracts, covering an area containing approximately 21,000 residences, in December 1991. Work commenced in January 1992.

The Improvement Contract, in § 1.04, required that waste collected in the Improvement be delivered to facilities designated by the Town. The Contract provided that title to

waste set out at curbside for collection in the Improvement would lie in the Town, and not the contractor. Smithtown had previously secured access to the Huntington Resource Recovery Facility (the "HRRF") for disposal of household garbage, and operated another Town facility for recyclables, bulk items and grass. The Improvement contractor paid a waste disposal fee to the Town which was reimbursed through the compensation agreed upon in the bid price. SSC's bid for its Contracts included a specific disposal cost component of $92.40 per home per year, utilizing the Town's previously specified "tipping fee" of $65 per ton.

The Contract was structured so that funds for both collection and disposal costs would be received from the households in the Improvement, then passed through to the contractor who would retain collection payments but return disposal costs to the Town in the form of tipping fees. This mechanism was employed to identify the disposal component of the bid price, so that disposal compensation could be adjusted up or down in the event of a change in tipping fees, to discourage the disposal of non-contract waste (*i.e.*, waste generated outside of the contractor's bid area) under the Contract, and to encourage the separation of recyclables from other waste at curbside. (*Smithtown*, SSC Petition at 28a-29a). In April 1994, the Town Board of Smithtown, after an investigation, determined that SSC had breached its Contract by diverting waste to disposal facilities other than those designated in the Contract, presumably for a lower price, while keeping the Contract payments earmarked for disposal costs. The Town's investigation included surveillance of SSC vehicles collecting waste at Contract residences, leaving the Contract area, and delivering their loads to SSC's transfer station for ultimate disposal at unknown locations. The Board authorized the Town Attorney to take legal action to recover $700,000 in Contract payments to SSC, representing disposal

fees for over 9,000 tons of waste diverted to unknown facilities.

The Town's counterclaim against SSC in the District Court alleged as well that at the time it submitted bids, SSC intended to divert Contract waste to other, cheaper disposal facilities, thereby allowing it to underbid its competitors, secure the Contract and defraud the bidding process.

REASONS FOR DENYING THE WRIT

I.

THE MARKET PARTICIPANT DOCTRINE WAS PROPERLY APPLIED TO THE IMPROVEMENT CONTRACT.

A. Municipalities Are Direct Providers of Services And Therefore Market Participants in Special Improvement Districts.

Smithtown's creation of its Solid Waste Collection and Disposal Improvement was by no means a unique or unconventional use of home rule power. The use of districts to provide and pay for local public services is common throughout the State of New York. The State legislature has generally authorized police, fire, water, sewer, highway and waste districts for all local municipalities, while specifically authorizing particular districts for ambulance services and even the disposal of duck waste in Suffolk County.[1]

Here the Solid Waste Collection and Disposal

1. Police Districts are authorized under N.Y. Town Law Article 10, Fire Districts under Article 11, Water, Sewer, Waste and other districts under Articles 12 and 12A, duck waste pursuant to § 198-a.

Improvement was created, and the Contract authorized, under N.Y. Town Law Article 3-A § 54 (McKinney 1987), which governs the creation of special service districts and the means to assess charges to the residents thereof.

The special district approach to public services allows geographic and financial specificity. Either the whole or something less than the whole of a municipal jurisdiction may be served, while the charges assessed to members of the district can be identified on the property tax bill as going to a particular purpose. In New York, districts and Improvement areas are created by act of the local legislature, subject to a permissive referendum by the taxpayers in the district.

Here, the public interest was twofold: providing reliable and efficient removal of waste from residential households, coupled with safe, secure and *identified* means of disposal. The public policy adopted by Smithtown was to provide those distinct though related services to residential properties through the government, financed through assessments upon real property.

The provision of services through the device of a special assessment district is unquestionably a public undertaking.

> [A]ny improvement constructed, acquired or provided pursuant to this section shall be a *town function* and the town board shall be responsible for the necessary maintenance, operation and repair thereof.

N.Y. Town Law § 54.12 (McKinney 1987) (emphasis added).

However, the Town may lawfully hire outside contractors to assist it in the provision of all or part of these services (*see*

N.Y. Town Law §§ 54.7, 197, authorizing the manner in which contracts shall be let for the performance of the work). Its powers include the *ability to choose* the manner of collection, as well as the place and method of disposal for Improvement waste. It could elect, under Town Law § 54, to perform the work with municipal employees. Whether it employs its own workers, or hires labor and equipment from firms such as SSC, it provides the service under a lawful arrangement with the residents of the Improvement. The Town's taxing power provides payment for both collection and disposal from those whom it serves.

Consequently, the Town has directly entered the market of providing waste services to the residents of the Improvement, contrary to SSC's contention in the Petition (at 17), that the Town "is merely a consumer of services which are performed by an independent private party." The suggestion made by SSC that the Market Participant Doctrine, as developed in *Hughes v. Alexandria Scrap Corp.*, 426 U.S. 794, 96 S. Ct. 2488 (1976), *Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S. Ct. 2271 (1980) and *White v. Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 103 S. Ct. 1042 (1983), is applicable to cases where the government is a buyer or seller of goods, or an employer, but *not* to the hiring of waste collection or disposal services, is simply absurd. SSC, far more directly than the Boston construction workers in *White*, is employed by, and under contract with, Smithtown. There is no need to construe SSC as "substantially if informally working for the city" (*White*, at n.7), when its Contract was quite formally bid upon and awarded.

Moreover, the consumption of services directly performed by private parties *does* entitle a municipality to market participant status when those services are provided locally and their purchase is challenged by out-of-state

competitors. A government may choose a local telephone service for its offices, a local lawyer to represent it, or a local car dealer from whom to purchase and service its vehicles, simply because it prefers to "restrict its trade to its own citizens or businesses." *Alexandria Scrap*, 426 U.S. at 808, 96 S. Ct. at 2497. Such choices of local over interstate services are made by government procurement offices every day.

B. The Town's Regulatory Act In Creating The Improvement Is Not Before the Court.

Prior to the formation of the Improvement, Smithtown's residences purchased waste collection and disposal services on an individual basis from licensed waste haulers such as SSC. The creation of the Improvement destroyed those private arrangements, denying access to the local residential waste service market to all private service providers, except those who, like SSC, have secured contracts to work for the Town.

The question of whether the formation of an Improvement district for the provision of waste services is prohibited by the dormant Commerce Clause, in light of this Court's ruling in *C&A Carbone v. Town of Clarkstown*, __ U.S. __, 114 S. Ct. 1677 (1994), was addressed by the Second Circuit in its decision in the companion cases to this matter, *A. A. & M. Carting Service Inc. v. Town of Babylon* and *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272 (2d Cir. 1995), (hereinafter "*Babylon*"), (decision annexed to the Cross-Petition in Appendix A at 1a-52a). There, the Town of Babylon, Smithtown's southerly neighbor, created an Improvement district under the same authorizing legislation, Town Law § 54, and took over the collection market for commercial waste, awarding a contract to a single firm to provide that service throughout the Town. The Court found that the total elimination of all private waste collection

activity, caused by the formation of Babylon's Improvement district, constituted regulation of the private market, not participation in it. (*Babylon*, Cross Petition at 21a).

Applying the traditional Commerce Clause analysis set forth in *Carbone, Oregon Waste Systems Inc. v. Department of Environmental Quality*, __U.S. __, 114 S. Ct. 1345 (1994) and *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S. Ct. 844 (1970), the Court of Appeals found that the total elimination of a private market did not discriminate against or impose undue burdens upon interstate commerce. (*Babylon*, Cross Petition at 22a). In so doing, the Court rejected the plaintiff carters' contention that the *Carbone* case had created a sweeping new limitation on the power of local governments to provide sanitation service to local residents and businesses where that service was provided on an exclusive basis and financed by local tax dollars.

The Court then went on to address the carters' challenge to the award of Babylon's contract to the so-called "favored" collection firm and the question of Babylon's relationship with its own incinerator operator.[2] With respect to these contracts, the Court found that Babylon was acting as a market participant in buying collection services from one and disposal services from the other. As such, it had the right to negotiate such terms as it deemed appropriate and to offer capacity at its incinerator to its collection firm at no charge. In finding market participation in these transactions, the Court made reference to its decision in *SSC Corp. v. Town of Smithtown*. (*Babylon*, Cross-Petition at 34a-36a, 41a-42a).

In the view of the Second Circuit Court of Appeals, it is

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2. Both Babylon and Smithtown have contracts with local subsidiaries of Ogden Martin Systems, Inc. a national supplier-builder and operator of mass-burn waste-to-energy systems.

the creation of an Improvement district in the first instance which eliminates private transactions and constitutes regulatory activity. Once having assumed the duty of providing solid waste services by eliminating the private market, the *fulfillment* of that duty is done by the municipality as a market participant. It must purchase or hire the services of men and equipment, fuel, insurance and sundry other items. As noted above, a municipality may perform its duty with the aid of outside contractors and it may freely define the scope of work of those contractors in the course of that procurement.

The critical difference between the *Smithtown* and *Babylon* cases, and the circumstance which makes the Commerce Clause analysis of *Carbone* inapposite here, is that SSC failed to challenge the only act by which Smithtown regulated the private market for residential waste collection — the formation of the Improvement. (*Smithtown*, SSC Petition at 11a, n.15). SSC had good reason for its failure to raise the challenge. To challenge the right of the Town to form the Improvement would be to sacrifice its own privileged position as recipient of the service Contract.

Instead, it advanced the unfounded notion that *Carbone* somehow vested waste haulers with an inalienable right to determine the means of disposal of the waste they are hired to haul. SSC claimed the power, not only to defy the direction of its customer the Town, but to speculate with the Town's tax dollars on the spot waste disposal market. The Court below properly refused to recognize such a right.

It may be presumed that the Court of Appeals would have come to the same conclusion on the formation of Smithtown's Improvement as it did with Babylon's — that it was regulation, but evenhanded regulation and not violative of the Commerce Clause. Nevertheless, the only question with

which the Court was presented in *Smithtown* was whether the Town, concededly in the fulfillment of a governmental duty, may properly direct its outside contractors to perform work to the same specifications as the Town's own employees. Under *White*, the answer is an unequivocal yes. Because the regulatory act which eliminated private service arrangements in the Improvement was not challenged below, that act is not presented to this Court for review in this case.

C. The Improvement Contract Imposes No Unconstitutional Condition Upon SSC.

Insofar as it challenges the Town's powers to specify the services performed in the Improvement, SSC claims that the Contract provision requiring delivery of waste to a facility selected by the Town is a mere condition, voidable under a line of cases articulating the doctrine of unconstitutional conditions, citing *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694 (1972); *Pickering v. Board of Education of Township High School District 205*, 391 U.S. 563, 88 S. Ct. 1731 (1968) and *Dolan v. City of Tigard*, __ U.S. __, 114 S. Ct. 2309 (1994).

All of SSC's rights to perform any service in its bid areas flow solely from the Town through the Contract. SSC has no privity of contract with any individual household which would allow it to collect, transport or dispose of Improvement waste on an independent basis.

The doctrine of unconstitutional conditions stands for the proposition that the government may not fetter the grant of particular benefits with the recipient's relinquishment of an independent right. Thus, the government may not condition school employment upon the teachers' relinquishment of their First Amendment rights to criticize school policy or budgets or

to utter "seditious" speech. *Perry v. Sinderman*, 408 U.S. 593, 92 S. Ct. 2694 (1972). Nor may it require a private trucker to register as a common carrier in order to obtain a certificate to use state highways, *Frost & Frost Trucking Co. v. Railroad Commission of California*, 271 U.S. 583, 46 S. Ct. 605 (1926), or condition a permit for land development upon dedication of a portion of that land to the government. *Dolan v. City of Tigard*, __ U.S. __, 114 S. Ct. 2309 (1994); *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983).

What distinguishes these cases from the matter at hand is that in each, the government sought to impose a condition *unrelated* to the main business sought to be done by the claimant. Thus, if the unconstitutional condition is lifted, the teacher continues to teach, the trucker to use the highways and the developer to build, subject to *reasonable* conditions related to the subject. *Perry* protects a teacher's right to criticize school policy. It does not license a Math teacher to unilaterally decide to teach English instead.

Here, SSC has no independent right which was surrendered by executing the Contract. It cannot collect or dispose of waste unless someone hires it to do so. In the Improvement, only the Town has hired it. In the Town's Contract, the place and method of disposal is a central objective, not a collateral condition.

SSC's misreading of *Carbone*, *Perry* and *Dolan* would not only leave it without competition from other private haulers in its bid areas, but steal from the taxpayers the exclusive power to choose the means of disposal for residential waste, without any degree of accountability to the public or any indemnity from the consequences of unlawful disposal.

The Court of Appeals correctly held it to the terms of its bargain.

II.

NO RECOGNIZED LIMITATIONS TO THE MARKET PARTICIPANT DOCTRINE ARE APPLICABLE TO THE SMITHTOWN IMPROVEMENT CONTRACT.

A. Solid Waste is not a Natural Resource.

Solid waste is a manmade phenomenon. The successive waves of immigrant humankind to set foot on the North American continent were not drawn here by the rotting heaps of garbage, junked cars, and industrial waste which now speckle our landscape. Garbage may, under the right circumstances, be a "resource" but there is nothing natural about it. In fact, to the extent it has a "natural" state, it is a noxious substance posing an immediate threat to the public health.

For this reason, people pay for services to remove and dispose of solid waste, and indeed governments on every level require that collection and disposal be performed safely. It is these services, as this Court has recognized, not the noxious object of their attention, which are the articles of commerce protected by the Constitution. *Carbone,* 114 S. Ct. at 1682.

The appellant substantially bases its arguments on two spurious contentions — that household trash is a "natural resource," and that the Market Participant Doctrine has no application to natural resources. As discussed below, each of these assertions is wholly meritless.

B. Household Trash Is Not A Natural Resource.

SSC's contention that the household refuse of the citizens of Smithtown is a natural resource is counterintuitive and flies in the face of the accepted definition of the term. *Blacks's Law Dictionary* (Rev. 4th Ed. 1968) defines "natural resource":

> The term includes not only timber, gas, oil, coal, minerals, lakes, and submerged lands, but also, features which supply a human need and contribute to the health, welfare, and benefit of a community, and are essential to the well-being thereof and proper enjoyment of property devoted to park and recreational purposes.

As is plain, not only is garbage not listed as an example of such resources, it is not, by any stretch, *ejusdem generis*. Indeed, trash is the very antithesis of the defining elements that natural resources "supply a human need and contribute to the health, welfare, and benefit of a community, and are essential to the well-being thereof." Furthermore, implicit in the term is the notion that the resource be found in nature, a quality distinctly lacking here.

Nor does SSC's fanciful position comport with this Court's take on natural resources. In *Reeves, Inc. v. Stake*, 447 U.S. 429, 443, 100 S. Ct. 2271, 2281 (1980), the Court observed that, "Cement is not a natural resource, like coal, timber, wild game, or minerals" [internal citations omitted] or like "minnows," "landfill sites" or "natural gas." "It is the end product of a complex process whereby a costly physical plant and human labor act on raw materials." *Reeves*, 447 U.S. at 444, 100 S. Ct. at 2281.

For the same reasons, refuse is not a natural resource. Here, the solid waste claimed to be a natural resource is to a very substantial degree a byproduct of "complex process[es]" in the initial manufacture and processing of the countless modern products that comprise today's refuse. In particular, the materials and energy end products to be derived from it are doubly removed from the realm of nature, as they are then further subjected to the modern and technologically-advanced reclamation, recycling and waste combustion "complex process[es]" that require "a costly physical plant" (the HRRF) and extensive "human labor act[ing] on the raw materials."

SSC's citation (Petition at 4) to *C&A Carbone v. Town of Clarkstown*, __ U.S. __, 114 S. Ct. 1677, 1682-83 (1994), is inapposite, if not misleading, insofar as the Court merely used the term "local resource," not "natural resource," and was merely referring to the resources' geographical location, not to any innate characteristics. Further, the Court's point of reference there was its earlier line of decisions dealing with meat, shrimp, oyster, cantaloupes and timber as articles of commerce. Thus, the relevant inquiry is whether the Commerce Clause is implicated because the state's action affects an article of commerce.[3] *See Sporhase v. Nebraska*, 458 U.S. 941, 951, 102 S. Ct. 3456, 3463 (1982), (rejecting claim that groundwater is not an article of commerce).

Moreover, the "essential vice" of the various laws that the Court had struck down in those earlier cases "is that they bar the import of the processing service." *Carbone*, 114 S. Ct. at 1683. Similarly, with respect to the facts in *Carbone*, the Court

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3. SSC's citations (Petition at 18) to *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923) and *West v. Kansas Natural Gas*, 221 U.S. 229 (1911), merely state the obvious — that natural resources such as natural gas are articles of commerce subject to the dormant Commerce Clause.

observed, "the article of commerce is not so much the solid waste itself, but rather the service of processing and disposing of it." *Carbone*, 114 S. Ct. at 1682. Thus, the statement that "this Court clearly considered solid waste to be a natural resource" (Petition at 4), is belied by the *Carbone* text.

The Petitioner's aberrant view is not buttressed by the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C.A. § 6901 *et seq.* That § 6901(c) and § 6901(d) state, respectively, that recoverable materials exist within solid waste and that solid waste represents a potential fuel source does not convert the polytypical mixture of plastics, lubricants, pharmaceuticals, foodstuffs, paper, metals and fibers found in the average homeowner's garbage pail into a natural resource. By this definition virtually anything — from discarded refrigerators to yesterday's leftover Wheaties — would fall under the rubric "natural resource" and render the definition meaningless.

The Petitioner's citation to Federal Trade Commission rule 58 Fed. Reg. 41356, 41358 (August 3, 1993) (Petition at 19-20), actually undermines its position, since the Rule points out that the "majority of methanol produced in the U.S. is from natural gas resources, but it can also be produced from coal, residual oil, and biomass . . .," thus differentiating between the two classes of sources — one found naturally, the other not.

C. There Is No Natural Resources Exception To The Market Participant Doctrine.

The only authority, *Reeves, Inc. v. Stake*, 447 U.S. at 443-44, cited by SSC for the proposition that "[a]n important exception to the Market Participant Doctrine exists where the state is dealing with a natural resource" (Petition at 18), upon

examination is something less than claimed. *Reeves,* in *dictum*, noted that "whatever limits might exist on a State's ability to invoke the *Alexandria Scrap* exemption to hoard resources which by happenstance are found there, those limits do not apply here." 447 U.S. at 444, 100 S. Ct. at 2281. However, this Court has not determined that any article of commerce is, *per se*, subject to different treatment under the Commerce Clause.

In *South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 104 S. Ct. 2237 (1984), the Court was presented with a case involving Alaskan timber, undeniably a natural resource, and the Market Participant Doctrine. If, as postulated by SSC, a natural resource exception to the Market Participant Doctrine exists under *Reeves,* the Court's analysis of the application of the doctrine would have ended upon determining timber to be a natural resource. Instead, the Court engaged in a lengthy discussion of its line of market participant decisions, the relevant market, common law restraints on alienation, vertical restraints and downstream effects on commerce. *South-Central Timber,* 467 U.S. at 91-99, 104 S. Ct. at 2242-2246. These issues would have been academic if the purported natural resource exception existed and was applied at the threshold.

While "[t]he precise contours of the market-participant doctrine have yet to be established," *South-Central Timber,* 447 U.S. at 93, 104 S. Ct. at 2243, no natural resource exception to the doctrine has yet been articulated by the Court. To the contrary, this Court has categorically stated:

> Our cases make clear that if a State is acting as market participant, rather than as a market regulator, the dormant Commerce Clause places no limitation on its activities.

Id. Accordingly, the Petitioner's ersatz exception must be disregarded.

D. No Downstream Market is Regulated by the Improvement Contract.

Petitioner refers the Court to the limitations on the Market Participant Doctrine discussed in *South Central Timber Development Inc. v. Wunnicke*, 467 U.S. 82, 104 S. Ct. 2237 (1984), with respect to the concept of "downstream" market regulation. *South-Central Timber* involved a sale by the State of Alaska of a quantity of timber to private buyers. Alaska placed a condition on the sale that after the timber had been delivered, the buyers were required to process it to some degree at sawmills in Alaska, as opposed to the mills of the buyers' choice. The plurality opinion in that decision held that while Alaska was a market participant in the timber market with respect to the immediate transaction, its attempt to impose post-sale requirements on the buyers constituted regulation of the "downstream" processing market in which it was not a participant.

The distinguishing feature in Smithtown's Improvement Contract is that the Town did not sell, and SSC did not buy, any rights to do anything in the Improvement except transport waste from the homes of the residents to the incinerator (or other facility) whose services the Town had separately purchased for use in disposal. The only conceivable "downstream transaction" here is the disposal arrangement, the second of the " 'two discrete, identifiable classes of economic activity': waste collection and disposal," in which the Court below found the Town to be participating. (*Smithtown*, SSC Petition at 27a, citing *White*, 460 U.S. at 211 n.7, 103 S. Ct. at 1046 n.7).

Whether the disposal transaction is considered to be between the Town and its residents through the tax bill, or between the Town and Ogden through the Huntington agreement, or between the Town and SSC through the Improvement Contract, the purchase of disposal service was directly made by the Town. There is no "downstream" transaction over which the Town exerts its influence because there is no transaction to which the Town is not a party. The essential fact here is that SSC has no real disposal obligation at all, merely the obligation to collect and deliver waste under the terms of its Contract.

As noted above, it is a misstatement of fact by SSC to claim that the tipping fee paid by SSC was "imposed by" the Town's incinerator operator, with the implication that SSC was forced to pay that entity, or that, but for the Contract, it otherwise would have had some right to make its own choice as to disposal services. As the Court of Appeals noted (*Smithtown*, SSC Petition at 28a-29a), the disposal fee "pass-through" mechanism in the Contract was designed to assist the Town in monitoring SSC's performance —particularly to discourage the disposal of non-Improvement waste under cover of the Contract — not as a conveyance of any right to shop for disposal sites.

SSC's position with regard to disposal of waste from the Improvement is analogous to that of a messenger service delivering a package from one municipal office to another, with directions to use a route taking it over a municipal toll bridge. The messenger may be required to pay the toll and be reimbursed by the city, because the city decides where the package is to go. Here, SSC is required to collect and deliver waste, pay the Town its fee and be reimbursed, because the Town, having established the Improvement, decides where the waste is to go.

Moreover, there is no basis for SSC's claims that interstate sellers of disposal services are denied access to waste generated in Smithtown. The interstate market is unimpaired. The services of interstate sellers are still sought, only it is the Town, not the private hauler, who is the buyer.[4] As this Court has explained on several occasions, the fact that an opportunity may be denied to a particular firm by government action does not establish a violation of the Commerce Clause.

> We cannot, however, accept appellants' underlying notion that the Commerce Clause protects the particular structure or methods of operation in a retail market. As indicated by the Court in *Hughes [v. Alexandria Scrap,* 426 U.S. 794, 96 S. Ct. 2488 (1976)] the clause protects the interstate market, not particular interstate firms, from prohibitive or burdensome regulations.

Exxon Corporation v. Governor of Maryland, 437 U.S. 117, 127, 98 S. Ct. 2207, 2215 (1978). *See also Southern Pacific Co. v. Arizona,* 325 U.S. 761, 65 S. Ct. 1515 (1945); *Kassel v. Consolidated Freightways Corp.,* 450 U.S. 662, 101 S. Ct. 1309 (1981); *Kleenwell Biohazard Waste v. Nelson,* 48 F.3d 391 (9th Cir. 1995), *cert. denied,* 115 S. Ct. 2580 (1995).

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4. Ogden Martin Systems, Inc., the operator of the Huntington incinerator is a Delaware corporation. Their services were secured by Huntington as a result of a nationwide procurement. In addition, Smithtown's recyclables are marketed to a variety of buyers across the United States and Canada.

III.

THERE IS NO CONFLICT WITH THE ELEVENTH CIRCUIT WARRANTING REVIEW OF THE DECISION BELOW.

Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority, 814 F. Supp. 1566 (M.D. Ala. 1993), *aff'd without op. sub. nom. Waste Recycling, Inc. v. Southeast Alabama Solid Waste Disposal Authority*, 29 F.3d 641 (11th Cir. 1994) is cited by Petitioner as in conflict with the decision of the Second Circuit below. This is not so for the simple reason that the Eleventh Circuit Court of Appeals did not write an opinion; it merely affirmed the result reached by the District Court and did not necessarily adopt the lower court's reasoning. *Sporhase*, 458 U.S. at 949, 102 S. Ct. at 3460.

The Court of Appeals' reference to *Waste Recycling* (Petition at 29a), states only that, "We decline to adopt the reasoning of the *Waste Recycling* court." Since the Eleventh Circuit's reasoning is unexpressed, the reference can only be to the District Court's decision. Yet even accepting the precedential value ascribed by the Petitioner to the Eleventh Circuit's affirmance in *Waste Recycling*, this does not necessarily constitute a conflict in the decisions of two United States Circuit Courts of Appeals as the nature of the conflict portrayed by Petitioner (at 23-25) is simply inaccurate.

The *Waste Recycling* plaintiffs were waste haulers subject to local ordinances, not municipal service contracts, which required them to deliver waste to facilities to be constructed by a public Authority serving a four-county area. The ordinances, adopted pursuant to contracts each of the three municipal defendants had made with the Authority, were directed at the haulers and carried civil and criminal penalties for violations.

The District Court rejected the market participant defense and held the cities to be regulators, not participants, on the grounds that "The cities would be able to implement such provisions only because of the regulatory powers they possess as sovereigns. These are not the types of measures which private participants in the marketplace could implement." 814 F.Supp at 1573.

It is entirely likely that the Second Circuit would have come to the same conclusion with respect to the question of participation versus regulation and on the same grounds. This is precisely the result which the Court below reached with respect to Smithtown's ordinance. "A state's actions constitute 'market participation' only if a private party could have engaged in the same actions." (*Smithtown*, SSC Petition at 22a-23a).

The Second Circuit found market participation by Smithtown on facts not before the *Waste Recycling* court — the contractual provision of collection and disposal services in an Improvement district funded by tax dollars. *See Waste Recycling*, 814 F. Supp. at 1583 n.22. There are no criminal penalties which compel SSC to adhere to the terms of its Contract. The Court invalidated those sections of the Smithtown Code which might have been applied against SSC.

Indeed, the only aspect of the decision in *Waste Recycling* which the Second Circuit declined to adopt dealt with alternative grounds (profit motive and ownership) to reject market participant status for one of the Alabama ordinances. *See* Petition at 29a-30a; *Waste Recycling*, 814 F. Supp. 1575-1576. Given the differences in the fact situations presented to the two Courts, coupled with their concurrence in reasoning on the dispositive issues, it cannot fairly be said that the two Circuit Courts are in conflict on the same important matter.

CONCLUSION

This Court should deny the writ as to all issues raised in the Petition.

Respectfully submitted,

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